

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34260

BILLY R. BARTLETT,	)	2008 Unpublished Opinion No. 709
	)	
Petitioner-Appellant,	)	Filed: November 17, 2008
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
STATE OF IDAHO,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Respondent.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Order dismissing application for post-conviction relief, affirmed.

Dennis A. Benjamin of Nevin, Benjamin, McKay & Bartlett, LLP, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

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PERRY, Judge

Billy R. Bartlett appeals from the district court's order dismissing his application for post-conviction relief after an evidentiary hearing. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

After a jury trial, Bartlett was found guilty of sexual abuse of a child under the age of sixteen years, I.C. § 18-1506, as well as being a persistent violator, I.C. § 19-2514. The district court sentenced Bartlett to a unified term of life imprisonment, with a minimum period of confinement of thirty years. Bartlett filed a direct appeal from his judgment of conviction and sentence alleging prosecutorial misconduct, insufficient evidence, and that his sentence was excessive. In an unpublished opinion, this Court affirmed Bartlett's judgment of conviction and sentence. *See State v. Bartlett*, Docket No. 29431 (Ct. App. June 1, 2004).

Bartlett then filed a pro se application for post-conviction relief, including several claims of ineffective assistance of counsel and a motion for appointment of counsel. The district court

granted Bartlett's motion for appointment of counsel, after which counsel filed a notice adopting Bartlett's pro se application. The district court gave notice of its intent to summarily dismiss Bartlett's application. Counsel filed a request for an extension of thirty days to file a memorandum in support of Bartlett's claims, which the district court granted. After the memorandum in support was filed, the district court entered an order partially dismissing Bartlett's application and scheduling an evidentiary hearing on his claims of ineffective assistance of counsel. Bartlett then filed a pro se objection and affidavit alleging dissatisfaction with post-conviction counsel for failure to communicate. Additionally, Bartlett filed a pro se motion for leave to file an amended petition in which he claimed he was invoking his right to proceed pro se under duress.

At the evidentiary hearing on Bartlett's remaining post-conviction claims, the district court addressed Bartlett's request to proceed pro se. Bartlett claimed that he was being forced to proceed pro se because of counsel's deficiencies. After counsel had an opportunity to respond to Bartlett's allegations of lack of communication, the district court took a brief recess in order for Bartlett to make his final decision of whether to proceed pro se. The district court advised Bartlett that, if he decided to proceed pro se, it would hold a *Faretta*<sup>1</sup> hearing at which the district court would essentially inform Bartlett that one who represents himself "has a fool for a client." Following the recess, Bartlett chose to continue with counsel. After the evidentiary hearing, the district court denied Bartlett's claims of ineffective assistance of counsel. Bartlett appeals, challenging the district court's denial of his application for post-conviction relief after an evidentiary hearing. Bartlett also challenges the district court's instruction that it would have to hold a *Faretta* hearing prior to allowing Bartlett to proceed pro se and the insinuation that Bartlett would be foolish to do so.

## II.

### ANALYSIS

#### A. Motion to Proceed Pro Se

Bartlett first argues that the district court abused its discretion by misinforming him of the need for, and the purpose of, a *Faretta* hearing if he elected to pursue his request to proceed pro se. Additionally, Bartlett argues that the district court erred by failing to inform him of his right to have private or publically-funded substitute counsel. The state counters that the district

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<sup>1</sup> *Faretta v. California*, 422 U.S. 806 (1975).

court was not required to advise Bartlett regarding his options if he were unsatisfied with appointed counsel; that Bartlett was not entitled to publically-funded substitute counsel; and that the district court did not err in advising Bartlett of the perils of opting to represent himself, particularly in light of the impending evidentiary hearing.

When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

As Bartlett concedes in his brief, the district court told him that *if* he elected to pursue his motion to represent himself, the district court would hold a *Faretta* hearing. However, Bartlett elected to keep appointed counsel for the evidentiary hearing, effectively withdrawing his motion to represent himself. Thus, the district court never ruled on his motion. Essentially, Bartlett asks this Court to review the district court's decision for an abuse of discretion when there was no adverse decision to appeal. Bartlett has failed to show error in the district court telling him that a hearing would have to be held on his motion and that the hearing would essentially be to warn him that it would be foolish to proceed pro se, when the district court never actually held the superfluous hearing.

We next consider Bartlett's argument that, once the district court undertook to advise Bartlett at all regarding the wisdom of proceeding pro se, it incurred a duty to thereafter advise him of the opportunity to retain private substitute counsel or to have substitute counsel appointed to represent him. Bartlett offers no authority in support of this argument. A party waives an issue on appeal if either authority or argument is lacking. *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). Therefore, we need not further address it.

## **2. Dismissal of Claims After an Evidentiary Hearing**

Lastly, Bartlett argues that the district court erred in dismissing his claim of ineffective assistance of trial counsel because adequate evidence was presented to establish that counsel was ineffective for failing to call additional witnesses and preventing Bartlett from testifying at trial. In order to prevail in a post-conviction proceeding, the applicant must prove the allegations by a preponderance of the evidence. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216

(1990). When reviewing a decision denying post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Russell v. State*, 118 Idaho 65, 794 P.2d 654 (Ct. App. 1990). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. *Larkin v. State*, 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct. App. 1988). We exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177. This Court has long-adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

Initially, we note that Bartlett's argument is that counsel was ineffective because his decision not to call certain witnesses and to advise Bartlett not to testify was based on an incomplete and flawed analysis that, by so doing, evidence of Bartlett's prior criminal history of lewd conduct would be revealed. In his brief, Bartlett concedes that "case law does support the theory that had Mr. Bartlett testified, his prior convictions could have been admissible." Therefore, counsel's concern that Bartlett's testifying at trial could lead to the jury's discovery of his prior record was not based in ignorance of the law. The district court did not err in denying Bartlett's claim of ineffective assistance of counsel for advising Bartlett not to testify.

Next we address whether Bartlett satisfied his burden of proof at the evidentiary hearing regarding his claim for ineffective assistance of counsel for failure to call additional witnesses. As noted above, Bartlett's argument is that counsel's decision not to call the witnesses, because of his fear that this would lead to the discovery of Bartlett's prior record, was based on an incomplete and flawed analysis. At the evidentiary hearing, Bartlett testified and alleged that the witnesses in question would have testified as to additional instances of the bad character of the state's key witness. The decision whether to call character witnesses is a strategic decision which ordinarily should not be second guessed on appeal. *Aragon v. State*, 114 Idaho 758, 763, 760 P.2d 1174, 1179 (1988). To the extent that Bartlett contends his attorney should have called the persons who could testify as to the bad character of the state's key witness, Bartlett has failed to show any prejudice. None of these witnesses testified at the evidentiary hearing nor did Bartlett provide any affidavits or other evidence as to the potential content of these witnesses' testimony other than his bare assertions. Therefore, Bartlett has failed to meet his burden of proving by a preponderance of the evidence that calling those witnesses would have affected the outcome of his trial or that he was prejudiced by counsel's failure to call them. Accordingly, the district court did not err in dismissing this claim of ineffective assistance of counsel after an evidentiary hearing.

### **III. CONCLUSION**

The district court did not abuse its discretion in advising Bartlett that it would have to hold a *Faretta* hearing if he chose to proceed pro se because Bartlett effectively withdrew his motion in electing to proceed with counsel. Therefore, the district court never decided his motion. Additionally, Bartlett failed to meet his burden of proving by a preponderance of the evidence his claim of ineffective assistance of counsel for failing to call additional witnesses and advising Bartlett not to testify at trial. Therefore, the district court's order denying Bartlett's application for post-conviction relief after an evidentiary hearing is affirmed. No costs or attorney fees are awarded on appeal.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**